



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

Nov. 6, 2020

Robert Hinchman
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
Room 4252 RFK Building
950 Pennsylvania Ave. NW
Washington DC 20530

Re: Processes and Procedures for Issuance and Use of Guidance Documents, RIN 1105-AB61, Docket No. OAG 169

Dear Mr. Hinchman:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) Rights Task Force submit these comments in response to the above-captioned Interim Final Rule and Request for Comments. CCD is the largest coalition of national organizations working together to advocate for Federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We urge the Department to withdraw this Interim Final Rule. The Rule would hamper the Justice Department's ability to issue important guidance to help stakeholders comply with the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and other laws; would create instability and uncertainty concerning the application of the ADA and Section 504 in a wide range of circumstances; and would tie up stretched agency resources in responding to limitless petitions to withdraw guidance documents. Moreover, the Rule is inconsistent with the Administrative Procedures Act (APA). It is ironic that the Department is moving to establish a subregulatory guidance public comment process by issuing a rulemaking without first going through the APA process of soliciting public comment on a proposed rule.

Administrative agency guidance is an extremely valuable tool through which executive branch agencies clarify how the law applies in specific areas and provide examples to illustrate those applications, helping to clarify ambiguities in laws and regulations. Administrative agencies regularly rely on such guidance to educate stakeholders on how the laws apply.

The Department of Justice has used guidance and technical assistance documents over the years to provide important information about disability rights laws to stakeholders including regulated entities as well as people with disabilities and their family members and advocates. While these documents do not create new law, they have been critically important in educating the public about how disability rights laws apply in a wide variety of contexts—including, for example, child care centers, child welfare systems, voting systems, consideration of HIV/AIDS in state licensure, service animals, small business issues, and others. These guidance documents are of great value to all stakeholders.

The Interim Final Rule would hamper the Department’s ability to issue important guidance

The Interim Final Rule would have a significant adverse effect on the Department’s ability to issue important guidance. By requiring everything in the broadly defined category of “significant guidance” to be approved and signed on a non-delegable basis by the Attorney General, Deputy Attorney General, or presidentially appointed agency component head and to go through a public notice and comment process and review by the Office of Management and Budget, the Interim Final Rule would hamper the agency’s ability to act nimbly to issue guidance on key issues.

Particularly in crisis situations such as the current COVID-19 pandemic, it is often important for agencies to be able to act quickly to explain the law’s application in different contexts. For example, a slew of agency guidance documents have been issued concerning the pandemic, including guidance from HHS’s Office for Civil Rights concerning the application of disability rights laws to crisis standards of care used to ration life-saving treatment, guidance from the Equal Employment Opportunity Commission concerning the ADA’s application to COVID-related issues in the workplace, and guidance from the Centers for Medicare and Medicaid Services concerning infection control procedures, visitation, and other issues in nursing homes and other congregate care facilities. Those guidance documents have been critical to help stakeholders understand rights and obligations during a time of immediate need. Requiring a public comment process and OMB review would make it impossible to issue such guidance documents on a timely basis.

While the Interim Final Rule contains an exception to public comment where the Department finds that it is impracticable, unnecessary, or contrary to the public interest, it is far from clear how those exceptions are to be applied and the general rule will clearly have a chilling effect on issuance of guidance.

The Interim Final Rule would create instability and uncertainty

The Interim Final Rule would create instability and uncertainty concerning the law’s application by establishing a procedure for petitions to withdraw or modify guidance documents, including a public invitation on the agency’s Guidance Portal to submit such petitions. This process would undermine the effectiveness of any guidance document by creating a constant and ongoing state of uncertainty about whether the guidance will continue in effect or be withdrawn or modified

pursuant to a petition from the public. Offering instructions on how to petition for withdrawal or modification of guidance every time that an individual uses the Guidance Portal to view a guidance document would serve little purpose except to continually invite the public to ask for the withdrawal or modification of guidance.

The Interim Final Rule would drain scarce agency resources

The Interim Final Rule’s process for petitions to withdraw or modify guidance would not only create uncertainty and instability but would also invite a significant drain on agency resources by requiring the agency to respond to each petition in writing within 90 days. Even where petitions contain inadequate information, the agency cannot deny them but must indicate what additional information is necessary to adjudicate the petition.

Such a rule would place the agency in the absurd position of spending time and resources not only responding to meritless petitions but doing the work for those who seek to tear down the agency’s guidance documents by laying out a roadmap and effectively crafting arguments for petitioners to have their petitions successfully adjudicated. The insufficiency of a petition should be enough to deny it rather than to create additional burdens on the agency. Under the scheme laid out, the more inadequate the petition, the more work the agency must do to identify what more would be needed. Moreover, the agency must do this not for one petition but for *every* petition, presumably including even successive petitions filed by the same individuals. It is little comfort that the Interim Final Rule would allow the agency to provide a “coordinated response” to “similar petitions;” the Department must still provide responses and identify what additional information would be necessary for each and every petition filed, no matter how frivolous.

This portion of the Interim Final Rule has the potential to require limitless expenditures of time and resources responding to petitions to withdraw or modify guidance documents. The Department can ill afford to spend time and resources responding to endless petitions challenging guidance documents. Indeed, in light of this risk, the true purpose of the Interim Final Rule appears to be to discourage the issuance of any guidance.

The Interim Final Rule contains inadequate protection for people with disabilities

The Interim Final Rule recognizes the importance of ensuring that people with disabilities are afforded equal opportunity to comment during public notice and comment periods but does little to assure that equal opportunity will be provided. Particularly given that this is an Interim Final Rule, and given the continuous process of inviting petitions to withdraw guidance, the agency must say more about how it will ensure that the procedures outlined in the guidance—including petitions that are filed—will be accessible to people with disabilities.

The Interim Final Rule is inconsistent with the Administrative Procedures Act

The Department lacks authority to issue the Interim Final Rule because it conflicts with the APA. As Executive Order 13891 itself notes, the APA expressly exempts guidance from the notice and comment requirements imposed for rulemaking. The statute establishes procedures for agencies to promulgate both formal rules and informal guidance, and requires notice and comment *only*

for formal rules. Agency guidance containing general statements of policy is expressly exempted from those requirements.¹ Notice and comment is unnecessary because guidance, unlike regulations, does not carry the force of law. The Interim Final Rule would subvert the scheme set forth by Congress in the APA.

For the reasons outlined above, we strongly urge you to withdraw this Interim Final Rule.

Sincerely,

American Council of the Blind

American Diabetes Association

American Foundation for the Blind

The Arc of the United States

Autistic Self Advocacy Network

Bazelon Center for Mental Health Law

Center for Public Representation

CommunicationFIRST

Disability Rights Education and Defense Fund

Easterseals

Epilepsy Foundation

National Association of Councils on Developmental Disabilities

National Council on Independent Living

National Disability Rights Network

National Health Law Program

National Center for Parent Leadership, Advocacy, and Community Empowerment

Paralyzed Veterans of America

World Institute on Disability

¹ 5 U.S.C. § 553(b)(3)(A).